86-1072

Supreme Court, U.S.
FILED
JAN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1072

In The

Supreme Court of the United States

OCTOBER TERM, 1986

NEW YORK,

Petitioner,

vs.

P. J. VIDEO, INC. d/b/a NETWORK VIDEO and JAMES ERHARDT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

1. Does this Court have jurisdiction to grant the Petition for a Writ of Certiorari?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE I, SECTION 12

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that

evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

28 U.S.C. § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision would be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

REASON FOR DENYING CERTIORARI

THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO REVIEW THE OPINION OF THE NEW YORK COURT OF APPEALS

The Petition for Certiorari filed by the District Attorney of Erie County must be denied because of the lack of jurisdictional basis for review. The jurisdictional statute cited by petitioner, 28 U.S.C. §1257(3), permits review by writ of certiorari only where:

> "the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

(See also, Article III of the United States Constitution).

Because petitioner seeks review of a state court judgment assessing individual rights and liberties under the State Constitution and Penal Laws, no federal question is implicated and the jurisdictional requisites of §1257(3) are not satisfied. This Court stated in *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459 (1945):

> "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge *federal* rights. And our power is to correct wrong judgments, not to revise opinions" (*Id.* at 125-126, 65 S.Ct. 463, emphasis supplied).

Without doubt, there is no federal right or question to be reviewed. Explaining its task on remand from this Court, the New York Court of Appeals said that the question before it was "whether Article I, Section 12 of the State Constitution imposes a more exacting standard for the issuance of search warrants autho-

rizing the seizure of allegedly obscene material than does the Federal Constitution (*People v. P.J. Video*, 65 NY2d 566, 575, *reversed and remanded, New York v. P.J. Video, Inc.*, ____U.S.____, 106 SCt 1610). We hold that it does and we therefore affirm the order of County Court suppressing the films" (B-1-B-2).[1]

It is the separation of powers between the federal and state branches of government which precludes this Court from reviewing a decision of the New York Court of Appeals resting entirely upon the State Constitution and state statutes. That grant of sovereignty was addressed by the Court of Appeals in its review upon remand:

> "The states exist as sovereign entities independent of the national government and the Tenth Amendment reserves to them and the people '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States' (U.S. Const Amend X). Thus, the 'structure of state governments and their sphere of operations simply are not the subjects of the Constitution, except insofar as the Constitution shifts power from the states to the national government, or protects the rights of individuals from government violations' (L. Tribe, *American Constitutional Law*, § 5-20, p. 300)" (B-11-B-12).

Given that division of power, state court judgments on state rights are immune from federal review. As explained by Justice Brennan in "State Constitutions and the Protection of Individual Rights," 90 Harv.L.Rev. 489, 501 (January, 1977):

> "And, of course, state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts. Moreover, the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the

[1] Numbers in parentheses refer to pages in the Appendix to the Petition for Certiorari.

> Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions."

The same limitation is expressed in the leading handbook on Supreme Court practice: "If, in fact, the judgment [of the state court] rests on a state ground the Supreme Court has no jurisdiction to review the case." Stern, R., Gressman, E. and Shapiro, S., *Supreme Court Practice*, p. 168 (6th Ed. 1986).

These authorities, reiterating verities which have been maintained since the inception of this country's judicial system are now, incredibly, ignored by the District Attorney. Indeed, petitioner, a highly placed representative of the state itself, appears to seek the overthrow of state sovereignty when, in rather menacing manner, he announces that the opinion of the Court of Appeals was not rendered in accordance with this Court's opinion and that it should be instructed "to comply with the mandate to consider this case in a manner not inconsistent with the Supreme Court's determination" (p. 5 of Petition for Certiorari). Most assuredly, the Court of Appeals, in relying on the State Constitution and statutes to affirm its earlier judgment, did render an opinion consistent with the decision of the Supreme Court. In exercising its authority to expand rights and liberties under the State Constitution beyond the minimum protections guaranteed by the United States Constitution (*see, Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040 [1980]), the Court gave due deference both to the sovereignty of the Supreme Court and the power reserved to it as arbiter of state rights. For the District Attorney to suggest that this Court's mandate incorporated a suggestion that New York should not exercise its independence is irre-

sponsible, invoking a spectre of totalitarianism totally foreign to the democracy that is ours.[2]

The petitioner's attempt to bypass the jurisdictional requirement, by arguing that the Court of Appeals decision was fostered by a flawed construction of this Court's opinion, is, quite simply, without merit. The Supreme Court will not review a state court ruling which rests on adequate and independent state grounds, even if a federal question is also involved. The reason for such abstention is explained in *Herb v. Pitcairn, supra:*

> "It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion" (*Herb v. Pitcairn, supra,* at 125-126, 65 S.Ct. 459).

In this explanation lies the practical problem underlying petitioner's suggestion that the Supreme Court should attempt to make its opinion more palatable to the Court of Appeals. Even assuming such further exposition was necessary or desirable, the

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[2] The cases cited by petitioner are inapposite to the argument he would construct. In *Oregon v. Mathiason,* 429 U.S. 492, 97 S.Ct. 711 (1977), certiorari was granted to clarify interpretation of the federal *Miranda* rule. *Schlude v. C.I.R.,* 372 U.S. 128, 83 S.Ct. 601 (1963), involved a federal question only, the definition of "income" under the federal income tax. Likewise, *Wilkinson v. United States,* 365 U.S. 399, 81 S.Ct. 567 (1961), concerned the breadth of power of the House Committee on un-American activities and its subcommittees. *McCandless v. Furlaud,* 296 U.S. 140, 56 S.Ct. 41 (1935), also involved federal, not state, issues of law. Thus, that in these cases the Supreme Court clarified earlier rulings is immaterial: the clarification was directed to resolution of federal rights and privileges, not state matters.

Supreme Court's opinion, should the Court of Appeals again decline to reverse itself, would be advisory only.

And, should any question remain, this Court's own definition of "adequate and independent" state grounds obviates any argument that the decision does not rest upon discrete state concerns but rather on an unwarranted interpretation of federal law. The Supreme Court noted, in the *P.J. Video* decision itself, that a state court decision unalterably rests upon adequate and independent state grounds if there is a "plain statement" by the state court that its decision hinges on state law (A-5). The Court of Appeals, on remand, issued that plain statement, in language that could not be any more precise. Its holding was as follows: "We hold, therefore, that this warrant application did not demonstrate the probable cause required under the provisions of Article I, Section 12 of the State Constitution. . ." (B-14).

Even apart from that plain statement which precludes acceptance of jurisdiction, it is otherwise evident that the New York Court of Appeals, with or without any further explication of the federal standard of probable cause, will not accept the affidavits in question as adequate foundation for a determination of probable cause of obscenity under New York Penal Law, Section 235.00. The decision represents more than a rejection of the "fair probability" standard. More essentially, it contains the assertion that the concerns of New York State in preservation of the fundamental rights of free expression and freedom from unlawful governmental intrusion are somewhat different from and broader than those of the federal government. Not only did the Court of Appeals state that it wished to strictly interpret judicial supervision of the warrant process (B-9), demanding a "rigorous, fact-specific standard of review imposed upon the magistrate" (B-10); it also noted that traditionally, New York has been a leader in the artistic and cultural life of the country (B-13), as well as a state "where freedom of expression and experimentation has not only

been tolerated, but encouraged" (B-14). Given that any obscenity case involves the consideration of contemporary community standards, to be defined according to state law[3], the Magistrate's responsibility to weigh the perceptions of the average New Yorker in and of itself led the Court of Appeals to review the probable cause determination in *People v. P.J. Video* more broadly than did the United States Supreme Court (*see*, B-13-B-14). Its right to do so is firmly etched in the concept of the separation of powers. Thus, the Court of Appeals noted:

> "One of the powers reserved to the states is the power to define what conduct shall be criminal within its borders. As Justice Marshall noted in his dissent, the determination whether a work is obscene and therefore criminal — or a determination whether probable cause exists to believe a work violates state proscriptions against obscenity — is a 'matter of state law and the rightful province of state courts.' " (B-12).

In this statement, if in no other, lies the reason why jurisdiction is foreclosed. New York has determined and explicitly stated that the affidavits in this case are not satisfactory as a matter of state law.

There, the matter must rest.

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[3] *People v. Heller*, 33 N.Y.2d 314, 323, adopts a statewide community standard for New York, rather than a locality based one.

CONCLUSION

For this reason, the Petition for Writ of Certiorari should be denied.

DATED: Buffalo, New York
January 15, 1987

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